

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUSTIN CEDRIC WATERS,

Defendant.

Case No. 3:17-cr-00009-HDM-VPC
Case No. 3:20-cv-00370-HDM

ORDER

Before the court is defendant Justin Cedric Waters' motion to vacate pursuant to 28 U.S.C. § 2255 (ECF No. 27). The government has responded (ECF No. 29), and Waters has replied (ECF No. 30).

On February 1, 2017, Waters was charged by way of indictment with one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g). (ECF No. 1). Pursuant to an agreement, Waters entered a plea of guilty to the charge. (ECF Nos. 15 & 17). The court thereafter sentenced Waters to 78 months in prison. (ECF Nos. 24 & 25).

Section 922(g) prohibits the possession of a firearm by several categories of persons, including any person who has been convicted in any court of a crime punishable by a term of more than one year in prison. 18 U.S.C. § 922(g)(1). At the time of his conviction, Waters had several prior felony convictions, including assault with a deadly weapon and unlawful driving or taking of a vehicle. When Waters was charged and entered his plea in this case, the government was not required to prove that he knew he was a felon. *United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003).

1 But after Waters was sentenced, the U.S. Supreme Court concluded
2 that a defendant may be convicted under § 922(g) only if the
3 government proves that the defendant “knew he belonged to the
4 relevant category of persons barred from possessing a firearm.”
5 *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). On the basis
6 of *Rehaif* and the government’s failure to charge his knowledge of
7 status, Waters now moves to vacate his conviction.

8 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to
9 vacate, set aside, or correct his sentence if: (1) the sentence
10 was imposed in violation of the Constitution or laws of the United
11 States; (2) the court was without jurisdiction to impose the
12 sentence; (3) the sentence was in excess of the maximum authorized
13 by law; or (4) the sentence is otherwise subject to collateral
14 attack. *Id.* § 2255(a).

15 Waters argues that the omission of the *Rehaif* element from
16 the indictment violated his Fifth Amendment rights guaranteeing
17 that a grand jury find probable cause to support all the necessary
18 elements of the crime and to not be tried on a fatally defective
19 indictment and his Sixth Amendment rights to notice of the
20 charges.¹ He also alleges that the defective indictment deprived
21 the court of jurisdiction. The government asserts that Waters has
22 waived his right to bring these claims, that his claims are
23 procedurally defaulted, and that the government is not required to
24 prove the defendant knew his possession of firearms was unlawful.

25
26 ¹ Although Waters’ motion also alleges violation of his Sixth
27 Amendment right to effective assistance of counsel, Waters
28 clarifies in his reply that he alleges deprivation of counsel only
to show the prejudice that resulted from the defect in the
indictment and not as a standalone claim.

1
2 As part of his plea, Waters “knowingly and expressly waive[d]
3 all collateral challenges, including any claims under 28 U.S.C. §
4 2255, to his conviction, sentence, and the procedure by which the
5 Court adjudicated guilt and imposed sentence, except non-waivable
6 claims of ineffective assistance of counsel.” (ECF No. 15 at 11).
7 Such “[a]n unconditional guilty plea waives all non-jurisdictional
8 defenses and cures all antecedent constitutional defects, allowing
9 only an attack on the voluntary and intelligent character of the
10 plea.” *United States v. Brizan*, 709 F.3d 864, 866–67 (9th Cir.
11 2013); *see also Tollett v. Henderson*, 411 U.S. 258, 267 (1973);
12 *United States v. Espinoza*, 816 Fed. App’x 82, 85 (9th Cir. June 1,
13 2020) (unpublished disposition) (unconditional plea waiver
14 precludes all Fifth and Sixth Amendment claims except to the extent
15 they contest the court’s jurisdiction or the voluntariness of the
16 plea). Thus, except to the extent Water attacks the jurisdiction
17 of the court,² his claims are waived.³

18 Waters’ jurisdictional argument is without merit. The
19 omission of an element from the indictment does not affect the
20 court’s jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630
21 (2002); *United States v. Ratigan*, 351 F.3d 957, 962–63 (9th Cir.
22 2003); *see also United States v. Jackson*, 2020 WL 7624842, at *1
23 (9th Cir. Dec. 22, 2020) (unpublished disposition) (rejecting the
24 defendant’s argument that omission of the *Rehaif* element deprived

25
26 ² Waters does not attack the voluntariness of his plea.

27 ³ The court agrees with the well-reasoned opinions of several
28 courts that none of the exceptions under *Tollett* to the collateral
challenge waiver applies in this case. *See, e.g., United States v.*
Kelbch, 2021 WL 96242, at *2 (D. Nev. Jan. 7, 2021).

1 the district court of jurisdiction); *United States v. Burleson*,
2 2020 WL 4218317, at *1 (July 23, 2020) (unpublished disposition)
3 (same); *Espinoza*, 2020 WL 2844542, at *1 (same); *United States v.*
4 *Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020); *United States v.*
5 *Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020); *United States v. Balde*,
6 943 F.3d 73, 88-92 (2d Cir. 2019); *United States v. Burghardt*, 939
7 F.3d 397, 402 (1st Cir. 2019). *Cf. United States v. Singh*, 979
8 F.3d 697, 730 (9th Cir. 2020) (on direct appeal, reviewing omission
9 of *Rehaif* element from indictment for plain error). The indictment
10 otherwise sufficiently states a criminal offense: possession of a
11 firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

12 Moreover, to the extent they are not otherwise waived, Waters'
13 claims are procedurally defaulted.

14 "If a criminal defendant could have raised a claim of error
15 on direct appeal but nonetheless failed to do so, he must
16 demonstrate" either "cause excusing his procedural default, and
17 actual prejudice resulting from the claim of error," *United States*
18 *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or that he is
19 actually innocent of the offense, *Bousley v. United States*, 523
20 U.S. 614, 622 (1998). "[C]ause for a procedural default on appeal
21 ordinarily requires a showing of some external impediment
22 preventing counsel from constructing or raising the claim." *Murray*
23 *v. Carrier*, 477 U.S. 478, 492 (1986). Actual prejudice "requires
24 the petitioner to establish 'not merely that the errors at ...
25 trial created a possibility of prejudice, but that they worked to
26 his actual and substantial disadvantage, infecting his entire
27 trial with error of constitutional dimensions.'" *Bradford v.*

1 *Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (internal citation
2 omitted).

3 Waters could have raised his claims on direct appeal but did
4 not do so. They are therefore procedurally defaulted. It is
5 unnecessary to resolve whether Waters can demonstrate cause for
6 the default, because even if he could, he cannot demonstrate
7 prejudice.⁴

8 Waters committed the instant offense after receiving a 24- to
9 72-month sentence for assault with a deadly weapon, and he actually
10 served more than two years of this sentence. (PSR ¶ 38). Further,
11 Waters acknowledged in his plea agreement that he had been
12 previously convicted of a felony. (ECF No. 16 at 3 & 6). Finally,
13 and most importantly, Waters acknowledged during his plea colloquy
14 both that he possessed the firearm after having sustained a prior
15 felony conviction - specifically, he said, assault with a deadly
16 weapon -- and that he was aware at the time of his offense that he
17 was not allowed to possess a firearm.⁵ In light of Waters'
18 admissions that he knew he was a convicted felon and that he was
19 prohibited from possessing firearms, the court is not persuaded
20 that the outcome of the proceedings would have been any different
21 had the grand jury been presented with, and the indictment had
22 alleged, the *Rehaif* element. Waters thus suffered no prejudice
23 from the omission of the *Rehaif* element.

24
25 ⁴ Waters does not argue actual innocence.

26 ⁵ Waters also noted a prior conviction for receiving stolen
27 property. The court presumes this was in reference to his other
28 felony conviction, which was for unlawful driving or taking of a
motor vehicle. Per the PSR, the vehicle in that case had been
previously reported stolen. (PSR ¶ 36).

1 Waters argues that he suffered prejudice because he was
2 convicted by a court lacking jurisdiction. For the reasons
3 previously discussed, this argument is without merit because the
4 errors Waters complains of did not deprive the court of
5 jurisdiction. Waters additionally argues that he was prejudiced
6 because the defect deprived him of effective assistance of counsel.
7 For the reasons already discussed, he cannot show a reasonable
8 probability of a different outcome had the *Rehaif* element been
9 included in the indictment, and thus he has not established
10 prejudice on this basis.

11 Waters alternatively argues that he is not required to
12 demonstrate prejudice to obtain relief because the omission is
13 structural error.

14 "[C]ertain errors, termed structural errors, might affect
15 substantial rights regardless of their actual impact on an
16 appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263
17 (2010) (internal punctuation and citations omitted). Thus,
18 structural error "warrant[s] habeas relief without a showing of
19 specific prejudice." *United States v. Withers*, 638 F.3d 1055, 1063-
20 64 (9th Cir. 2011). "But structural errors are a very limited class
21 of errors that affect the framework within which the trial
22 proceeds, such that it is often difficult to assess the effect of
23 the error." *Marcus*, 560 U.S. at 263 (internal punctuation and
24 citations omitted). Cases in which the Supreme Court has found
25 structural error include total deprivation of counsel, lack of an
26 impartial trial judge, violation of the right to a public trial
27 and an erroneous reasonable-doubt instruction. See *id.* (discussing
28 cases). In contrast, errors that have been found to be non-

1 structural include where the court instructed on an invalid
2 alternative theory of guilt, gave an instruction omitting an
3 element of the offense, or erroneously instructed the jury on an
4 element. *Id.* at 264 (discussing cases).

5 The Ninth Circuit has not yet addressed in a published opinion
6 whether omission of the *Rehaif* element from the indictment is
7 structural error. But it has held that the error is not structural
8 in at least one unpublished decision. See *United States v. Jackson*,
9 2020 WL 7624842, at *1 n.1 (9th Cir. Dec. 22, 2020). And the First,
10 Third, Fifth, Seventh, Eighth, and Tenth Circuits have concluded
11 that *Rehaif* errors are not structural. *United States v. Patrone*,
12 985 F.3d 81, 86 (1st Cir. 2021); *United States v. Nasir*, 982 F.3d.
13 144, 171 n.30 (3d Cir. Dec. 1, 2020); *United States v. Lavalais*,
14 960 F.3d 180, 187 (5th Cir. 2020); *United States v. Payne*, 964
15 F.3d 652, 657 (7th Cir. 2020); *United United States v. Coleman*,
16 961 F.3d 1024, 1030 (8th Cir. 2020); *States v. Trujillo*, 960 F.3d
17 1196, 1207 (10th Cir. 2020); see also *United States v. Hill*, 2020
18 WL 7258551, at *2 n.3 (3d Cir. Dec. 10, 2020) (unpublished
19 disposition); *United States v. Watson*, 820 Fed. App'x 397, 400
20 (6th Cir. 2020) (unpublished disposition). But see *United States*
21 *v. Gary*, 954 F.3d 194, 206 (4th Cir. 2020). This court agrees with
22 the well-reasoned opinions of these courts and concludes that a
23 *Rehaif* error does not fall within the limited class of errors the
24 Supreme Court has found to be structural.⁶

25 ⁶ While there is some case law holding that defects in the
26 indictment are structural error, those cases apply only where the
27 claim is timely raised. See, e.g., *United States v. Du Bo*, 186
28 F.3d 1177, 1179 & 1180 n.3 (9th Cir. 1999) ("We hold that, if
properly challenged prior to trial, an indictment's complete
failure to recite an essential element of the charged offense is
not a minor or technical flaw subject to harmless error analysis,

1 Finally, Waters argues that *Rehaif* requires the government to
 2 prove not only that he knew that he was a convicted felon but also
 3 that he knew he was barred from possessing firearms.
 4 Notwithstanding the fact that Waters admitted to the court that he
 5 knew he was barred from possessing a firearm, Waters' legal
 6 argument is also without merit. *United States v. Singh*, 979 F.3d
 7 697, 727 (9th Cir. 2020) ("[The defendant] contends that *Rehaif*
 8 requires the Government to prove he knew not only his status, but
 9 also that he knew his status prohibited him from owning a firearm.
 10 But this interpretation is not supported by *Rehaif* . . .).

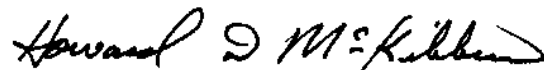
11 Accordingly, because the claims raised in Waters' § 2255
 12 motion are waived, procedurally defaulted and/or without merit, IT
 13 IS THEREFORE ORDERED that the motion to vacate, set aside or
 14 correct sentence (ECF No. 27) is hereby DENIED.

15 IT IS FURTHER ORDERED that Waters is DENIED a certificate of
 16 appealability, as jurists of reason would not find the court's
 17 denial of the motion to be debatable or wrong.

18 The Clerk of Court shall enter final judgment accordingly.

19 IT IS SO ORDERED.

20 DATED: This 5th day of April, 2021.

21 

22 UNITED STATES DISTRICT JUDGE
 23
 24

25 but a fatal flaw requiring dismissal of the indictment. . . .
 26 Untimely challenges to the sufficiency of an indictment are
 27 reviewed under a more liberal standard."). Waters argues that he
 28 raised his argument at the earliest possible opportunity and so
 the timeliness limitation does not apply. The court does not agree.
 Waters could have challenged the indictment well before now. The
 claim is not timely raised.